No. 9746.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

vs.

J. LESLIE MORRIS COMPANY, INC., a corporation,

Appellee.

PETITION FOR REHEARING ON BEHALF OF THE APPELLEE, J. LESLIE MORRIS COMPANY, INC., A CORPORATION.

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To the Honorable Circuit Court of Appeals for the Ninth Circuit:

Appellee J. Leslie Morris Company, Inc., a corporation, respectfully petitions for a rehearing of this appeal and urges the court to reconsider its decision in this case for the following reasons and upon the following grounds:

I.

The Decision Is in Conflict With the Law, the Statute and Decisions of the Supreme Court and Circuit Court of Appeals for Other Circuits.

The Supreme Court of the United States has announced in its decision in the case of *Cadwalader v. Jessup & Moore,* 149 U. S. 350:

> 'The uncontradicted testimony is to the effect that the only commercial use or value of the old india

> rubber shoes, or scrap rubber, or rubber scrap in question, is by reason of the india rubber contained therein, as a substitute for crude rubber; that the old shoes were of commercial use and value only by reason of the india rubber they contained, as a substitute for crude rubber, *and not by reason of any preparation or manufacture which they had undergone;* that they could not fairly be called 'articles composed of india rubber,' and as such dutiable at 25 per centum *ad valorem;* and that, although the shoes may have been originally manufactured articles composed of india rubber, they lost their commercial value as such articles, and substantially were merely the material called 'crude rubber.' They were not fabrics or india rubber shoes, because they had lost substantially their commercial value as such." (Italics supplied.)

It is respectfully submitted that the connecting rods which are the subject under discussion in the instant case had a value far in excess of their value as raw material because of the manufacturing processes they had previously undergone. Under the rule established by the above case it is essential that the only value be that of raw material. That if the value of the article results from the manufacturing process previously undergone, then the value is because of that manufacturing process, and not as raw material. The record indicates that the appellee herein paid from $1.60 to $1.90 for each connecting rod, which was far in excess of the junk or raw material value. [R. 124.]

Appellee cites *Hartranft v. Wiegmann,* 121 U. S. 609, as an additional authority on the question of who is a manufacturer and what is manufacturing. The issue in that case concerned the rate of duty to be levied upon certain shells depending upon whether they were or were

not "manufactured." The question involved and the facts are stated in the opinion of Mr. Justice Blatchford, as follows, 1 C. 613-14:

> "The question is whether cleaning off the outer layer of the shell by acid, and then grinding off the second layer by an emery wheel, so as to expose the brilliant inner layer is a manufacture of the shell, the object of these manipulations being simply for the purpose of ornament, and some of the shells being afterwards etched by acids, so as to produce inscriptions upon them. It appears that these shells in question were to be sold for ornaments, and that shells of these descriptions have also a use to be made into buttons and handles of penknives; and that there is no difference in name and use between the shells ground on the emery wheel and those not ground. It is contended by the government that the shells prepared by the mechanical or chemical means stated in the record, for ultimate use, are shells manufactured, or manufactures of shells, within the meaning of the statute."

The conclusion of the court and the reasoning supporting it are set forth in the following excerpt from the opinion l. c. 615:

> "We are of the opinion that the shells in question here were not manufactured, and were not manufactures of shells, within the sense of the statute imposing a duty of 35 per centum upon such manufactures, but were shells not manufactured, and fell under that designation in the free list. They are still shells. *They had not been manufactured into a new and different article, having a distinctive name, character or use from that of a shell.* The application of

labor to an article, either by hand or by mechanism, does not make the article necesarily a manufactured article, within the meaning of that term as used in the tariff laws. Washing and scouring wool does not make the resulting wool a manufacture of wool. Cleaning and ginning cotton does not make the resulting cotton a manufacture of cotton. In 'Schedule M' of Section 2504 of the Revised Statutes, page 475, 2nd Edition, a duty of 30 per cent *ad valorem* is imposed on 'coral cut or manufactured'; and in Section 2505, page 484, 'coral marine, unmanufactured', is exempt from duty. These provisions clearly imply that, but for the special provisions imposing a duty on cut coral, it would not be regarded as a manufactured article, although labor was employed in cutting it. In *Frazee v. Moffit,* 20 Blatchf. 267, it was held that hay pressed in bales, ready for market, was not a manufactured article, although labor had been bestowed in cutting and drying the grass and baling the hay. In *Lawrence v. Allen,* 48 U. S. 7 How. 785, it was held that india rubber shoes, made in Brazil, by simply allowing the sap of the india rubber tree to harden upon a mold, were a manufactured article, because it was capable of use in that shape as a shoe, and had been put into a new form, capable of use and designed to be used in such new form. In *United States v. Potts,* 9 U. S. 5 Cranch 284, round copper plates turned up and raised at the edges from four to five inches by the application of labor, to fit them for subsequent use in the manufacture of copper vessels, but which were still bought by the pound as copper for use in making copper vessels, were held not to be manufactured copper. In the case of *United States v. Wilson,* 1 Hunt's Merchants' Magazine 167, Judge Betts held that marble which had been cut into blocks for the convenience of trans-

portation was not manufactured marble, but was free from duty, as being unmanufactured.

"We are of the opinion that the decision of the circuit court was correct. But, if the question were one of doubt ,the doubt would be resolved in favor of the importer, 'as duties are never imposed on citizens upon vague or doubtful interpretations.' *Powers v. Barney,* 5 Blatchf. 202; *U. S. v. Isham,* 84 U. S., 17 Wall. 496, 504; *Gurr v. Scudds,* 11 Exch. 190, 191; *Adams v. Bancroft,* 3 Sumn. 384." (Italics supplied.)

The third case cited is *Anheuser-Busch Brewing Association v. U. S.,* 207 U. S. 556, in which the plaintiff sued to recover certain import duties which it paid on corks designed for use in bottling beer.

Under the act there involved plaintiff was required to prove as the basis of its refund or "drawback" that the corks involved were not manufactured corks but merely materials imported to be used in the manufacture of corks in the United States. The evidence showed that the corks imported into this country from Spain had already been cut by hand to the required size. It was further shown that in such condition, however, they were not suitable for use in bottling beer because they would not retain the gas in the bottle and because they would impart a cork taste to the beer, thereby making it unmarketable and unfit for use. After importation, however, the corks were subjected in the brewing company's plant to various processes and treatment consuming several days of time, during which the corks were treated, processed,

sealed and coated so as to render them useful for the intended purpose. The court found that the process to which the corks were subject did not constitute manufacture; that the corks were manufactured before they were imported and that the brewing company was not entitled to its refund. In the opinion by Mr. Justice McKenna it is said, l. c. 559:

> "The corks in question were, after their importation, subject to a special treatment which, it is contended, caused them to be articles manufactured in the United States of 'imported materials' within the meaning of Section 25. The Court of Claims decided against the contention and dismissed the petition. 41 Ct. Cl. 389.
>
> "The treatment to which the corks were subjected is detailed in Finding 3, inserted in the margin.
>
> "In opposition to the judgment of the Court of Claims counsel have submitted many definitions of 'manufacture,' both as a noun and a verb, which, however applicable to the cases in which they were used, would be, we think, extended too far if made to cover the treatment detailed in Finding 3 or to the corks after the treatment. The words of the statute are indeed so familiar in use and meaning that they are confused by attempts at definition. Their first sense as used is fabrication or composition—a new article is produced of which the imported material constitutes an ingredient or part. When we go further than this in explanation, we are involved in refinements and in impractical niceties. Manufacture

> implies a change, but every change is not manufacture, and yet every change in an article is the result of treatment, labor, and manipulation. But something more is necessary, as set forth and illustrated in *Hartranft v. Wiegmann,* 121 U. S. 609, 7 Sup. Ct. Rep. 1240. *There must be transformation; a new and different article must emerge, 'having a distinctive name, character or use.'* This cannot be said of the corks in question. A cork put through the claimant's process is still a cork." (Italics supplied.)

Appellee contends that the preceding cases are directly in point and are authority supporting the contention that said appellee is not a manufacturer. Under the rule laid down in *Hartranft v. Wiegmann* and *Anheuser-Busch Brewing Association v. U. S., supra,* it is necessary that a new and different article of commerce emerge in order for "manufacturing" to exist.

In defining the meaning of words used in statutes imposing excise taxes it is always the practice of the courts to look to other cases, including cases arising under the tariff and patent laws for guidance. In this regard the petitioner herein also relies on *American Fruit Growers, Inc. v. Brogdex,* 283 U. S. 1; *Goodyear Shoe Machinery Company v. Jackson,* 112 Fed. 146 (C.C.A. 1, 1901); *Foglesong Machinery Company v. J. D. Randall Company,* 237 Fed. 893 (C.C.A. 6, 1917); *Ely Norris Safe Company v. Mosler Safe Co.,* 62 Fed. (2d) 524 (C.C.A. 2, 1933); and *Hess-Bright Mfg. Co. v. Bearing Co.,* 271 Fed. 350 (D. C. Pa., 1921).

II.

Treasury Regulations 46, Article 4, Approved June 18, 1932, Regulating Taxation of Automobile Parts and Accessories, Under Paragraph 606(c) of the Revenue Act of 1932, Does Not Purport to Levy a Tax on the Sale of Rebabbitted Automobile Connecting Rods.

Regulations 46, Article 4, was adopted for the purpose of clarifying the Revenue Act of 1932. Otherwise it would be claimed that certain operations which in themselves involved no manufacturing whatever, were not subject to the act, even though automobile parts or accessories were produced. For instance, it would be possible to purchase various items which are not taxable and assemble them into automobile parts or accessories and sell them tax free because there was no manufacturing. However, there was certainly production, and the person so combining or assembling them would certainly be a producer.

It is conceded by the appellant that there is no tax on immediate repairs. However, this Honorable Court holds that because of the fact that appellee operates on a large scale, places quantities of rebabbitted connecting rods in stock and sells them under the trade name "Moroloy" and issues cataogues, that it is a "manufacturer or producer." This places an undue burden on this petitioner because of the size of its operations and the service it is prepared to render.

Even though this petitioner conceded, which it does not, that the above regulations had the force and effect of law, they would be too vague and incomplete to impose a tax upon the operations of appellee. This Honorable Court is well aware of the rule that literal interpretations can be insisted on in resistance to taxing statutes.

This Honorable Court places great emphasis on *Clawson & Bals v. Harrison* (C.C.A. 7), 108 Fed. (2d) 991, in reaching its conclusions herein. However, that case differed in many respects from the instant case, notably in that Clawson & Bals were manufacturers of new connecting rods in addition to being rebabbitters. They commingled new and rebabbitted connecting rods and sold them all as C & B rods, making no difference in guaranty, cataloging or pricing. The purchasers had no way of telling if they were getting entirely new connecting rods or rebabbitted ones. Under the circumstances there existing the court could not reach any other conclusion than that they were manufacturers. It is conceded that had this appellee forged new connecting rods or contracted with a foundry for their forging, that it would rightly be classed as a manufacturer. However, that was not the case. Ninety-five per cent of the connecting rods rebabbitted by appellee were received from wholesale automobile parts jobbers in exchange for rebabbitted rods of the identical type. The remaining five per cent were purchased from new car dealers and dealers in used parts. [R. 119-120.]

Petitioner cites *Thurman, Collector v. Swisshelm* (C. C. A. 7), 36 Fed. (2d) 350. The principles underlying the *Swisshelm* case do not differ from the instant case. Swisshelm commenced his process with an automobile, compeltely manufactured and tax paid by the manufacturer; the plaintiff in this case commenced its work with connecting rods previously manufactured and tax paid by the manufacturer. When Swisshelm finished his process, he still had an automobile—he had created nothing new; when appellee herein completed the rebabbitting process, it still had connecting rods—it had created nothing new.

There is no evidence in the record to sustain the court's statement that the connecting rods rebabbitted by appellee had been discarded prior to acquisition by appellee. In fact the record indicates that the rods had been carefully saved by the wholesale automobile parts jobbers and sent to appellee so that they might be rebabbitted and thereby restored to their original condition of usefulness.

Conclusion.

By reason of the fact that the question involved herein is of grave importance to not only the appellee, but also to many other companies throughout the United States engaged in the same business, and because certain misunderstandings have already arisen wherein some of them claim not to be affected by the decision because their operations differ somewhat from those detailed in the opinion and findings of the trial court, it is respectfully submitted that this Honorable Court grant a rehearing of this appeal in order that the full import of the decisions of the Supreme Court and Circuit Courts of Appeals involving patent and tariff laws may be applied by this Honorable Court in its decision of this appeal.

Respectfully submitted,

DARIUS F. JOHNSON and
MESERVE, MUMPER AND HUGHES,
Attorneys for Appellee.

Certificate of Counsel.

I, Darius F. Johnson, of counsel for the above appellee, do hereby certify that the foregoing petition for rehearing of this cause is presented in good faith and not interposed for the purpose of delay.

DARIUS F. JOHNSON.